(5)

No. 84-1560

In The Supreme Court

OF THE

United States

OCTOBER TERM, 1985

THE PRESS-ENTERPRISE COMPANY, a California corporation,
Petitioner,
VS.
THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF RIVERSIDE,
Respondent.

ON WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

BRIEF OF PETITIONER ON THE MERITS

JAMES D. WARD
SHARON J. WATERS
THOMPSON & COLEGATE
3610 Fourteenth St.
Riverside, California 92501
(714) 682-5550
Counsel for Petitioner

Bowne of Los Angeles, Inc., Law Printers (213) 742-6600.

QUESTIONS PRESENTED

1. Whether the public's right of access to criminal proceedings, guaranteed by the United States Constitution First Amendment, extends to pretrial proceedings, in particular, preliminary hearings.

2. Whether the standard for closure of preliminary hearings under *California Penal Code,* Section 868 set by the California Supreme Court violates the constitutional rights of the public, including the press.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES

CASES

Constitution

TABLE OF AUTHORITIES

CONSTITUTION

Miscellaneous

Rules

Statutes

TABLE OF AUTHORITIES

STATUTES

Textbooks

No. 84-1560

In The Supreme Court

OF THE

United States

OCTOBER TERM, 1985

THE PRESS-ENTERPRISE COMPANY, a California corporation,
Petitioner,
vs.
THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF RIVERSIDE,
Respondent.

BRIEF OF PETITIONER ON THE MERITS

ORDERS BELOW

The Order of the California Supreme Court was reported and appears in the Joint Appendix. (See Joint Appendix, page 4). The order of the California Court of Appeals, Fourth District, Division Two was reported and appears in the Appendix to the Petition for Writ of Certiorari. (See Appendix, page E-1.)

JURISDICTION

The Order of the California Supreme Court was entered on December 31, 1984, and became final on January 31, 1985. Under 28 U.S.C., Section 1257(3), this Court's jurisdiction is invoked. On October 15, 1985, this Court entered an order granting a hearing.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment 1:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment 6:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Amendment 14, Section 1:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE

On December 23, 1981, a complaint was filed in the municipal court, Riverside Judicial District in the County of Riverside, State of California against ROBERT RUBANE DIAZ, alleging twelve counts of murder. The People alleged that the murders had been committed

within the meaning of *California Penal Code,* Section 190.2(a)(3), warranting the death penalty.

Approximately six months later, on July 6, 1982, the preliminary hearing in the matter of *People v. Robert Rubane Diaz* commenced in the Riverside Municipal Court. At that time, the defendant moved to exclude the public under *California Penal Code,* Section 868. The magistrate granted the request and closed the hearing. (J.A., p. 21).

The preliminary hearing lasted a total of 41 days. The defendant was held to answer on all counts alleged in the criminal complaint and the reporters' transcripts of the preliminary hearing were sealed until further order of the court. (J.A., p. 37).

On January 21, 1983, the People moved in superior court to have the transcripts of the preliminary hearing released to the public. On February 7, 1983, petitioner filed an application to join in support for release of the preliminary hearing transcripts. On February 10, 1983, the defendant filed opposition, claiming that the release of the transcripts would result in prejudicial publicity, jeopardizing the defendant's right to a fair and impartial trial.

In support of his opposition, defendant submitted to the trial court approximately eighty (80) articles (see Exhibit "C" to the Petition for Writ of Mandate). Well over half of these articles were published in May and June of 1981 when the mystery of the numerous but unexplained hospital deaths first came to light.

Other articles were based on interviews with defendant in which he discussed his $1,000,000.00 civil rights suit and asserted his innocence in connection with the deaths in question. Many of the articles submitted by defendant

were published in newspapers outside of Riverside County.

News coverage diminished significantly after the defendant's arrest in November, 1981. Many of the articles which were published after the arrest focused on allegations of mismanagement in the public defender's office and alleged misuse of funds in connection with the defendant's case.

From the conclusion of the preliminary hearing through the hearing on the motion to release transcript on February 10, 1983, the petitioner's reporting of this case and anything related to it consisted of seven stories, which appeared in the second section of the daily newspapers published by petitioner in Riverside County. These stories included the magistrate's holding the defendant to answer on all counts, the defense counsel's publicly expressed concern that the magistrate might have been biased in his conduct of the closed pretrial proceeding, the postponement of the arraignment, the marriage of the lead defense counsel to his investigator, the scheduling by the respondent court of eighteen months for the trial, sundry civil lawsuits filed in the wake of this case and an unusual altercation in the courtroom between two defense counsel in the presence of court personnel and other observers.

On February 10, 1983, the superior court trial judge found that the information contained in the transcript was neither "inflammatory" nor "exciting" but there was, nonetheless, "a reasonable likelihood that release of all or any part of the transcript might prejudice defendant's right to a fair trial." (J.A., p. 60). The trial court denied the request to unseal the transcripts.

The Court of Appeal of the State of California, Fourth Appellate District, Division Two, denied petitioner's petition for writ of mandate for review of the trial court's actions. The supreme court, however, granted the petition and ordered the matter retransferred to the court of appeal, with directions to issue an alternative writ of mandamus and to set the matter for hearing.

The court of appeal, on January 12, 1984, discharged the alternative writ of mandate and denied issuance of the peremptory writ. The court determined that there was no constitutional right of public access to preliminary hearings.

Petitioner again sought review in the California Supreme Court. On December 31, 1984, the court ruled that the First Amendment of the United States Constitution does not provide a right of access to preliminary hearings. It further determined that the statutory right of access under *California Penal Code,* Section 868 could be denied upon a showing of a "reasonable likelihood of substantial prejudice" to the defendant's right to a fair trial.

Prior to oral argument in the appellate court, the defendant waived his right to a jury trial. (J.A., p. 65). Thereafter, before the court of appeal rendered its decision, the trial judge released the transcripts, finding no likelihood of prejudice in light of the defendant's waiver. The court of appeal retained jurisdiction, nonetheless, determining that although rendered technically moot, the issue was of statewide concern and "capable of repetition yet evading review."[1]

---

[1]Because the transcripts were released in October of 1983, the issue of possible mootness arises. However, jurisdiction is not defeated if the underlying dispute is one "capable of repetition, yet evading review." *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 603 (1982). The controversy in this case is one which is capable of repetition in that it reasonably can be assumed that petitioner and the public will be denied access to other preliminary hearings. It can also be reasonably assumed that such denial will likely evade review.

SUMMARY OF ARGUMENT

The First Amendment right of public access to pretrial proceedings, specifically the preliminary hearing, in a criminal case is the primary issue before the Court.

This constitutional right implicitly was denied recognition originally by the magistrate in closing the preliminary hearing and thereafter by the trial court in keeping the transcripts of that proceeding sealed. The trial court's action in refusing to release the transcripts, based on the belief that such release would create a reasonable likelihood of prejudice to the defendant's fair-trial rights, was subsequently sustained by both the court of appeal and the California Supreme Court. In each instance, the appellate court in question denied the existence of a constitutional right of public access to preliminary hearings.

The denial was based primarily on the courts' belief that decisions of this Court precluded extension of such a right outside of the trial. But none of this Court's decisions specifically limit the First Amendment right of access to the trial proceeding or precludes its recognition in a pretrial context. To the contrary, the reasoning of this Court in recognizing the constitutional right of access to trial proceedings applies with full force to the preliminary hearing which has the procedural attributes of the trial itself.

The values inherent in open trials are also compelling at the preliminary hearing stage. Access to this proceeding, which traditionally has been open to the public, furthers the societal interests of accurate fact-finding and avoidance of misconduct as well as the structural values of educating the public on matters of great public concern and inspiring public confidence in our criminal justice system. In fact, with relatively fewer criminal cases actually going to trial, these values are more compelling at the preliminary hearing stage.

In addition to denying the existence of a constitutional right of access to preliminary hearings, the California Supreme Court determined that closure of this proceeding was appropriate upon a showing of a reasonable likelihood of substantial prejudice to the defendant's fair-trial rights. This standard is constitutionally deficient. It fails to require trial courts to consider alternatives to secret proceedings and fails to require trial courts to make express findings that closure is the only effective means for protecting against a perceived harm. As such, the California standard allows for closures that violate the First Amendment right of public access.

The public's right of access to preliminary hearings should be established by a decision of this Court, along with the appropriate standard for closure of such proceedings.

ARGUMENT

I

THE FIRST AMENDMENT GUARANTEES PUBLIC ACCESS TO PRELIMINARY HEARINGS IN CALIFORNIA CRIMINAL CASES

A. Characterizing a Proceeding as Pretrial is not Dispositive of the Issue of the First Amendment Right of Access

The California Supreme Court erroneously determined that the constitutional right of public access arising under the First Amendment does not extend to preliminary hearings. The court's ruling was based on its belief that opinions of this Court precluded extending the right of access beyond trial proceedings. In reaching this conclusion, the supreme court ignored the analysis of this

Court supporting the First Amendment right of access to trial and jury selection and failed to consider whether this reasoning supports a right of access to preliminary hearings.

In *Gannett v. DePasquale,* 443 U.S. 368 (1979), this Court specifically reserved the issue of whether a right of access would exist under the First Amendment, stating, "We need not decide in the abstract, however, whether there is any such constitutional right." *Id.,* at 392.

This Court first addressed and began to define the First Amendment right of access in *Richmond Newspapers v. Virginia,* 448 U.S. 555 (1980) wherein the Court stated:

> "We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment . . . ."
> *Id.,* at 580.

This historic pronouncement was reaffirmed in *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596 (1982), wherein this Court upheld the First Amendment right of access to criminal trials, striking as unconstitutional a mandatory closure statute. "Where, as in the present case, the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Id.,* at 606, 607.

In *Press-Enterprise Co. v. Superior Court,* 464 U.S. 501 (1984), this Court found that this constitutional right of public access extends to the *voir dire* proceeding, finding that, "[t]he process of jury selection is itself a matter of importance, not simply to the adversaries, but to the criminal justice system." *Id.,* at ____. Noticeably absent

from the Court's opinion was any discussion of whether jury selection is part of the trial or pretrial.

In each instance wherein this Court has found a First Amendment right of access to a court proceeding, it has based its decision on a determination that public access furthers vital societal interests and "plays a particularly significant role in the functioning of the judicial process and the government as a whole," *Globe Newspaper,* 457 U.S. at 606.

The constitutional right of public access cannot be arbitrarily foreclosed to the preliminary hearing simply by characterizing the proceeding as pretrial. "[T]he distinction between trials and other official proceedings is not necessarily dispositive, or even important, in evaluating the First Amendment issues." *Press-Enterprise,* 464 U.S. at ____ (Stevens, J., concurring). Rather the proceeding itself must be examined to determine if the principles sustaining the right of access to other court proceedings support access to the proceeding in question.

B. The Preliminary Hearing in California Plays a Pivotal Role in the Effective Administration of Criminal Justice

Under California law, a preliminary hearing has all of the procedural attributes of the trial itself. As the California Supreme Court described the "impressive array of procedural rights" afforded the defendant, the preliminary hearing includes a determination of probable cause "before a neutral and legally knowledgeable magistrate, representation by retained or appointed counsel, the confrontation and cross-examination of hostile witnesses, and the opportunity to personally appear and affirmatively present exculpatory evidence." *Johnson v. Superior Court,* 15 Cal.3d 248, 256, 539 P.2d 792, 799, 124 Cal.Rptr. 32, 37 (1975) (Mosk, J., concurring).

At the preliminary hearing, the defendant has a right to present an affirmative defense such as alibi, self-defense or entrapment and may develop that defense either through the cross-examination of prosecution witnesses or the testimony of defense witnesses. *Jennings v. Superior Court,* 66 Cal.2d 867, 428 P.2d 304, 59 Cal.Rptr. 440 (1967). California courts have even held that a pre-preliminary hearing "discovery motion" can be pursued to develop evidence to support an affirmative defense at the preliminary hearing, *People v. Justice Court (DeRoco),* 118 Cal.App.3d 78, 173 Cal.Rptr. 851 (1981), and that a defendant is entitled to a continuance of the preliminary examination to obtain a material witness for an affirmative defense, *People v. Iocca,* 37 Cal.App.3d 73, 112 Cal.Rptr. 102 (1974). Where a government confidential informant may be a material witness, the defendant is entitled to a hearing as to whether the identity of the informant must be disclosed. *California Evidence Code,* Section 1042.

The benefits afforded an accused by the preliminary hearing are so substantial, the California Supreme Court held a denial of a preliminary hearing to a defendant who has been indicted by a grand jury violates the equal protection clause of the California Constitution. *Hawkins v. Superior Court,* 22 Cal.3d 584, 586 P.2d 916, 150 Cal.Rptr. 435 (1978). Thus, every defendant charged with a felony offense in California, whether by information or by grand jury indictment, has an absolute right to a preliminary hearing.

California applies the provisions of its Evidence Code regarding the admission and exclusion of evidence at the preliminary hearing. *California Evidence Code,* Section 300; *Rogers v. Superior Court,* 46 Cal.2d 3, 291 P.2d 929 (1955). The California courts insist that no evidence be admitted at the preliminary hearing which would not be

admissible at the trial.[2] *Id.; People v. Schuber,* 71 Cal. App.2d 773, 163 P.2d 498 (1945). Even judicially created evidentiary rules are applied just as strictly as at trial. The corpus delicti of the offense, for example, must be established by evidence independent of the defendant's extra-judicial statements, even at the preliminary hearing. *People v. Ramirez,* 91 Cal.App.3d 132, 153 Cal.Rptr. 789 (1979); *Jones v. Superior Court,* 96 Cal.App.3d 390, 157 Cal.Rptr. 809 (1979).

The constitutional exclusionary rules are fully applied at California preliminary hearings, making a motion to suppress evidence a standard part of the bill of fare. The California Penal Code specifically authorizes motions to suppress tangible evidence obtained by search or seizure to be made at the preliminary hearing:

> If the property or evidence relates to a felony offense initiated by complaint, . . . the defendant may make the motion at the preliminary hearing in the municipal or justice court but the motion in the municipal or justice court shall be restricted to evidence sought to be introduced by the people at the preliminary hearing.

California Penal Code, Section 1538.5(f).[3] Constitutional objections can also be raised to the admissibility of confessions and the admissibility of eye-witness identifi-

---

[2]An exception to the rule prohibiting the use of hearsay at the preliminary hearing is *California Penal Code,* § 872(b). This section allows the prosecution to use hearsay evidence in the form of sworn written declarations of certain witnesses. This exception only applies to the testimony of witnesses who are neither the victim of the crime nor providing an eyewitness identification of the defendant. Even with this exception, however, the defendant retains the right to call witnesses including those whose declarations have been submitted, for purposes of cross-examination. *California Penal Code,* § 872(c).

[3]Compare Fed. R. Crim. Proc. 5.1(a):

cation testimony. *People v. Malich,* 15 Cal.App.3d 253, 93 Cal.Rptr. 87 (1971).

The powers available to the magistrate presiding at a California preliminary hearing are indistinguishable from the powers conferred by California law on trial judges. The magistrate determines the credibility of witnesses and determines what weight to give their testimony, "and neither the superior court nor the appellate court may substitute its judgment as to such question." *DeMond v. Superior Court,* 57 Cal.2d 340, 345, 368 P.2d 865, 19 Cal.Rptr. 313 (1962).

The California magistrate is empowered to order an action dismissed "in furtherance of justice." *California Penal Code,* Section 1385, (amended in 1980 to abrogate *People v. Peter,* 21 Cal.3d 749, 581 P.2d 651, 147 Cal.Rptr. 646 (1978)). The factual findings of the magistrate may require the reduction of the charges to a lesser-included offense, or in a case where special circumstances permitting the imposition of the death penalty are alleged, that the case proceed as a non-death penalty case. *Ghent v. Superior Court,* 90 Cal.App.3d 944, 153 Cal.Rptr. 720 (1979). In cases which can be prosecuted as either a misdemeanor or a felony under California law, the magistrate at the preliminary hearing is empowered to reduce the level of the crime from felony to misdemeanor, even over the objection of the prosecutor, thus disposing of the charges with finality. *California Penal Code,* Section 17(b)(5); *Esteybar v. Municipal Court,* 5 Cal.3d 119, 485 P.2d 1140, 95 Cal.Rptr. 524 (1971); *Malone v. Superior Court,* 47 Cal.App.3d 313, 120 Cal.Rptr. 851 (1975).

"Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination."

While the ultimate determination of guilt or innocence is obviously not made in the preliminary hearing, in all other respects, the preliminary hearing closely resembles the trial itself. Accordingly, the benefits derived from open trials are equally compelling at the preliminary hearing stage.

C. Access to Preliminary Hearings Furthers Important Societal and Structural Interests

Important benefits are derived by allowing the public to attend court proceedings. Open court proceedings are a necessity in the functioning of a democratic society. The benefits derived and the interests served by allowing access to criminal trials are also obtained by allowing access to preliminary hearings.

> Openness in court proceedings may improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, cause all trial participants to perform their duties more conscientiously, and generally give the public an opportunity to observe the judicial system. *Gannett,* 443 U.S. at 383.

Indeed, the need for accurate fact-finding, avoidance of misconduct, abuse and perjury, and the ferretting out of additional witnesses with relevant testimony may be more compelling at this earlier stage in the criminal process as it could result in fewer unwarranted prosecutions. The importance to the innocent defendant of an accurate and early determination cannot be overstated. The decision to hold the defendant over for trial may "imperil the suspect's job, interrupt his source of income, impair his family relationships or otherwise impose significant restraints and burdens on the suspect," the most drastic being pretrial confinement, *Gerstein v. Pugh,* 420 U.S. 103 (1975). The benefit to society in an accurate determina-

tion of probable cause is efficient use of criminal justice resources and avoidance of unnecessary expense.

Public access "fosters an appearance of fairness, thereby heightening public respect for the judicial process." *Globe Newspaper,* 457 U.S. at 606. "For a civilization founded upon principles of ordered liberty to survive and flourish, its members must share the conviction that they are governed equitably." *Richmond Newspapers,* 448 U.S. at 594 (Brennan, J., concurring). Having the ability to make an independent assessment that sufficient cause exists to impose the burden of a criminal trial upon another member of society, all members of the public will have greater confidence in their criminal justice system. The public may well perceive closed hearings as secret, the proceedings hidden from it by government authorities seeking to cover wrongdoing. "[T]he sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press-Enterprise,* 464 U.S. at ____.

Public access also includes a "community therapeutic value." *Id.,* at ____.

> Without an awareness that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful 'self help' as indeed they did regularly in the activities of vigilante 'committees' on our frontiers . . . it is not enough to say that results alone will satiate the natural community desire for 'satisfaction'.

Richmond Newspapers, 448 U.S. at 571. No greater frustration of this "fundamental, natural yearning to see justice done — or even the urge for retribution" (*Id.,* at

571), can occur than when, after a secret preliminary hearing, the suspect is released.

Public access also educates the public, a necessary component of effective self-government, *Richmond Newspapers,* 448 U.S. at 572. "Underlying the First Amendment right of access to criminal trials is the common understanding that 'a major purpose of that Amendment was to protect the free discussion of governmental affairs.' " *Globe Newspaper,* 457 U.S. at 604. "Thus to the extent that the First Amendment embraces the right of access to criminal trials, it is to ensure that this constitutionally protected 'discussion of governmental affairs' is an informed one." *Id.,* at 604, 605. This concept is not just theory. There are many examples where public scrutiny of the judicial branch has resulted in political action in California.

In 1982, Californians adopted an initiative measure known as the "Victim's Bill of Rights", which radically changed the administration of criminal justice by limiting exclusionary rules, reformulating the insanity defense, establishing new standards for bail and the admissions of prior convictions, and giving victims a right to participate in sentencing procedures. See, *Brosnahan v. Brown,* 32 Cal.3d 236, 651 P.2d 274, 186 Cal.Rptr. 30 (1982).

In 1983, an unsuccessful effort was made to qualify another initiative measure for the ballot which would have, among other reforms, eliminated preliminary hearings where a grand jury indictment has occurred, admitted hearsay evidence at preliminary hearings, and excluded evidence having no direct bearing on the issue of probable cause. Miller, *A Reasoned Approach to Criminal Justice Reform,* Los Angeles Lawyer, September 1983, page 6.

One particular preliminary hearing has focused great public attention and debate, spawning numerous legislative proposals. The preliminary hearing in *People v. Buckey, et al.*,[4] a child molestation case, commonly referred to as the McMartin Pre-School Case, has been underway since August, 1984. As a result of public awareness of this hearing, the California Legislature has enacted numerous statutes impacting on preliminary hearings.[5]

A measure is currently before the state legislature to amend the state constitution to abrogate the *Hawkins* ruling and require defendants indicted by a grand jury to proceed directly to trial without a preliminary hearing. Constitutional Amendment Number 10, sponsored by Senator Ed Davis, California Legislature, 1984-85 Session. In order for this ongoing public debate about the criminal justice system to be informed, public access is clearly essential.

[4]Los Angeles Municipal Court Case Nos. A-750900 and A-753005.

[5]Senate Bill 46, Chapter 43 of the Statutes of 1985, allowed for special videotaping procedures of the testimony of victims of child abuse. Assembly Bill 804, Chapter 122 of the Statutes of 1985, took corrective action on a 1984 statute of limitations code section. Assembly Bill 31, Chapter 308 of the Statutes of 1985, allows for the interruption of a preliminary hearing in child abuse cases, thus creating an exception to the "one session" rule. Assembly Bill 30, Chapter 467 of the Statutes of 1985, amended the Penal Code to provide for two support personnel instead of one to accompany a victim during the course of testifying. Assembly Bill 762, Chapter 1010 of the Statutes of 1985, provided for enhancement of penalties in child abuse cases where the perpetrator of the crime was a child care provider. Assembly Bill 33, Chapter 1097 of the Statutes of 1985, provided for "targeted prosecution program" in child abuse cases. Senate Bill 301, Chapter 1172 of the Statutes of 1985, amended the statute of limitations in child abuse cases. Assembly Bill 32, Chapter 1174 of the Statutes of 1985, specifically authorized changes in the courtroom such as the judge removing his robe, rearrangement of furniture, etc., to make the courtroom less intimidating to child abuse victims. The foregoing is not an exhaustive list of legislation following in the wake of *McMartin*.

Secret hearings have the ill effect of prompting second-hand, inaccurate accounts of events. Even though these accounts later may be corrected, timeliness and opportunity may be lost. This sequence even occurred in the instant case. Defense counsel publicly misquoted the magistrate's comments at the end of the closed hearing, indicating his opinion that these comments showed an improper bias. The account was not accurate but the transcript had been sealed and the judge declined to comment. Soon after, the judge was considered for elevation to the superior court. Clearly a judge's performance in a lower court at a time he is being considered for elevation would be a matter of legitimate public interest. Yet public debate on this issue was stunted by secrecy. (See, September 1, 1982 article attached as Exhibit "C" to Petition for Writ of Mandate and J.A., p. 27.). It was not until later that the transcript was released.

The importance of public access to the preliminary hearing is further underscored by the fact that very few criminal cases actually proceed to trial. For the vast majority of cases in California, the preliminary hearing is the only litigation of the factual events underlying the prosecution.[6]

In the 1983-84 fiscal year, the most recent year for which statistics are available, the California superior

[6]Another provision added as a result of the Victim's Bill of Rights was a restriction on plea-bargaining in serious felony cases after an information has been filed. *Penal Code*, Section 1192.7. Although its full impact has not yet been determined, logically this restriction will result in even more cases being disposed of at the preliminary hearing stage and thus even fewer cases going to trial.

courts disposed of 66,534 defendants accused of felonies. However, only 6,710 were disposed of by trials.[7] During that same time period, California municipal and justice courts disposed of 98,338 felony charges. Of these, a total of 52,119 defendants had preliminary hearings and, in over 90% of these, the defendant was held to answer in superior court.[8] Thus, one trial took place for every eight preliminary hearings.[9]

Often providing the sole opportunity for public scrutiny of our criminal system, the preliminary hearing is an increasingly important proceeding.

> Although not perceived as such by most magistrates, the preliminary hearing may now be the most important procedural mechanism for an equitable administration of the current plea bargaining system. Certainly, given the disposition of most criminal defendants to bargain their case out before trial, the magistrate now stands as the sole judicial officer in the system whose discretionary power could effectively be used to counter-balance the dominion of the prosecutor at the preliminary hearing.

Note, *The Preliminary Hearing in California: Adaptive Procedures in a Plea Bargain System of Criminal Justice,* 28 Stan. L.Rev. 1207, 1223 (1976).

---

[7]1985 Annual Report Judicial Council of California, pp. 116-119.

[8]1985 Annual Report Judicial Council of California, pp. 140, 145.

[9]The Riverside County superior courts, during the same time period, disposed of 1,426 defendants accused of felonies but only 162 of these were disposed of by trials. At the same time Riverside municipal courts disposed of 3,355 defendants of which 1,383 had preliminary hearings. Of these, 999 defendants were bound over for trial. Thus, in Riverside County, approximately 1 trial took place for every 6 preliminary hearings.

As the preliminary hearing in California assumes a pivotal role in the effective administration of criminal justice, the need for public access to this proceeding intensifies. The mistaken assumption that the values inherent in constitutional access are adequately served by allowing such access only to trials is inconsistent with the decisions of this Court and could undermine the very reasons for which this right exists.

D. In The United States Preliminary Hearings Traditionally Have Been Public Proceedings

This Court has used history as a guide in determining whether the First Amendment right of access applies to particular judicial proceedings and has found that both the *voir dire* as well as the trial historically have been public proceedings. *Richmond Newspapers,* 448 U.S. 550; *Press-Enterprise,* 464 U.S. 501. While historical references to public pretrial proceedings may be scarce, the information available lends support for the conclusion that pretrial proceedings traditionally have been open.[10]

As Amici more fully delineate, the preliminary hearing in America after independence is critically distinguishable from its early English counterpart. The sixteenth century English "preliminary hearing" was inquisitorial rather than adjudicatory, with the magistrate serving as investigator, operating out of the public's view without the panoply of rights for the accused. 5 W. Holdworth, *A History of English Law,* 169-77 (2d Ed. 1937). Thus, reference to early English common law is of little assis-

---

[10]The absence of voluminous historical materials has not caused this Court concern on past occasions. See, e.g., *Press-Enterprise,* 464 U.S. at ____. "That there was little in the way of a contemporary record from this period is not surprising . . . why trouble to record that which every village elder knows?" *Richmond Newspapers v. Virginia,* 448 U.S. at 565, n. 5.

tance in determining whether the right of access extends to the preliminary hearing as it has evolved in the United States.

Early in the American experience, as an outgrowth of the Bill of Rights, the preliminary hearing became a judicial proceeding in which the magistrate acted as a neutral fact-finder rather than an arm of the prosecution. R. Pound, *Criminal Justice in America* 80 (1930). Concurrently, this proceeding was opened to the public and has remained so almost uniformly. Geis, *Preliminary Hearings and the Press,* 8 U.C.L.A. L.Rev. 397, 407 (1961).

Despite the "near uniform practice [of open pretrial proceedings] in the federal and state court systems" (*New Jersey v. Williams,* 93 N.J. 39, ____, 459 A.2d 641, 649 (1983)), eight states, including California,[11] incorporated the Field Code provision giving the defendant the ability to close preliminary hearings. This aberrational provision, according to one writer, is probably best explained as resulting from Field's "personal antipathy toward newspapers." Geis, *supra,* at 408.

Regardless of the reason for its inclusion in the statutes in these jurisdictions, the fact remains that even in this handful of states, the provision has been rarely invoked. Geis, *supra,* at 407. Thus the practice in these few states, historically and currently, is consistent with that in the majority of jurisdictions — that of open preliminary hearings.

It is apparent that as preliminary hearings became adjudicatory proceedings, taking on the attributes of the

---

[11]The California statutes establishing the preliminary hearing originally provided only for the exclusion of witnesses under certain circumstances. 1849 Cal.Stat., Ch. 119, § 161. In 1851, the provision was added which provided that the magistrate should exclude the public upon the request of defendant. 1851 Cal.Stat., Ch. 29, § 161.

trial, American jurisdictions drew from the lessons of the history of open trials and the recognized values inherent in that process and logically called for public preliminary hearings. Today, the inherent values of open judicial proceedings continue to apply to preliminary hearings.

II

THE STANDARD FOR CLOSURE SET BY THE CALIFORNIA SUPREME COURT FAILS TO RECOGNIZE AND PROTECT THE PUBLIC'S CONSTITUTIONAL RIGHT OF ACCESS

Because the California Supreme Court failed to recognize the public's constitutional right of access as mandated by this Court, it also failed to establish adequate requirements under *California Penal Code,* Section 868 that must be met before closed preliminary hearings are permitted. Section 868 states that "the examination shall be open and public" unless "exclusion of the public is necessary to protect the defendant's right to a fair and impartial trial." The supreme court determined that closure is "necessary" upon a showing of "a reasonable likelihood of substantial prejudice."

Petitioner acknowledges that but for the existence of a First Amendment right of access to these proceedings, the issue of the standard under Section 868 would not be properly before the Court. However, should this Court determine that the First Amendment right of access does in fact extend to preliminary hearings, then the standard set by the California Supreme Court is clearly unconstitutional.

This Court has held that "openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to

be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Press-Enterprise,* 464 U.S. at ____ .

Similarly, in *Richmond,* after discussing available alternatives to closure, this Court stated, "Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public." *Richmond Newspapers,* 448 U.S. at 581. "The circumstances under which the press and public can be barred from a criminal trial are limited; the State's justification in denying access must be a weighty one. Where . . . the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Globe Newspaper,* 457 U.S. at 606, 607.

This same standard has been applied by this Court to closure of a pretrial proceeding.

> Under *Press-Enterprise,* the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.

Waller v. Georgia, 467 U.S. 39, ____ (1984).[12]

There is a significant difference between petitioner's proposed standard and that adopted by the supreme court. By finding that closure is permissible upon a

---

[12]While the Court in *Waller* was addressing the defendant's Sixth Amendment right to a public trial, it nonetheless determined that the interests inherent in open trials were no less compelling in a pretrial suppression hearing.

simple showing of "a reasonable likelihood of substantial prejudice", the court overlooked the fact that the standard proposed by petitioner is part of a three-prong test set by the Ninth Circuit in *United States v. Brooklier,* 685 F.2d 1162 (9th Cir. 1982).

In *Brooklier,* the Ninth Circuit adopted the standard advanced by Justice Blackman on behalf of himself and three other Justices in *Gannett,* 443 U.S. 368, and determined that this standard is met if the following is demonstrated:

> (1) A substantial probability that irreparable damage to [the defendant's] fair-trial right will result from conducting the proceeding in public;
>
> (2) A substantial probability that alternatives to closure will not protect adequately his right to a fair trial; and
>
> (3) A substantial probability that closure will be effective in protecting against the perceived harm.

Id., at 441, 442.

Some federal circuits apparently disagree on the showing of prejudice to be made ("likely to be prejudiced" *(United States v. Chagra,* 701 F.2d 354, 365 (5th Cir. 1983)); "significant risk of prejudice" *(Application of the Herald Co.,* 734 F.2d 93, 100 (2nd Cir. 1984))). But they agree that in addition to a showing of potential prejudice, before resorting to closure, it must be established that other means to protect against the harm would be inadequate and that closure would be effective. See also, *United States v. Criden,* 675 F.2d 550 (3rd Cir. 1982).

The standard set by the California Supreme Court is deficient in that it fails to incorporate the following important safeguards:

(1) It does not require the trial court to consider reasonable alternatives to closure;

(2) It does not require closure to be narrowly tailored and no broader than necessary to protect the overriding interest;

(3) It does not require the trial court to determine that any form of closure will protect an overriding interest; and

(4) It does not require the trial court to make findings adequate to support the closure order.

The failure to incorporate these additional components leaves the California standard constitutionally inadequate.

That the California standard allows for secret proceedings without adequate justification is most pointedly established by the facts of this case. At the time respondent court considered the request to release the transcripts in February of 1983, the preliminary hearing had been concluded nearly six months previously. While the trial date at that time was approximately six weeks away, shortly after denying the request to release the transcripts, the trial court continued the trial to October, nearly eight months later.

Over half of the eighty newspaper articles submitted by defendant were nearly 21 months old. Many of the articles did not involve potential trial evidence. Many were from newspapers circulated outside Riverside County. The trial judge additionally considered the information in the transcripts. Of this, he said "[I]t was as factual as it could be.... It's not extremely inflammatory or exciting type of facts in this." (J.A., p. 60)

Thus, at the time release of the transcripts was requested, the information in the transcripts lacked the

timeliness element of intense newsworthiness and the jury selection process was far enough away to allow memories to fade. Nonetheless, the trial court, with the only showing of publicity being a collection of mostly old and often irrelevant newsclippings, found a "reasonable likelihood" that publication of purely factual matters would prejudice the defendant's right to a fair trial. This would have been clearly inadequate to prove "a substantial probability of irreparable harm."

Nor did the trial court consider any alternatives to complete closure or make any findings that closure would protect effectively against the risk of prejudice. Under the three-prong test advanced by petitioner, the trial court would not have been able to justify keeping the entire transcript sealed.

One of the reasons advanced by the California Supreme Court justifying its loose standard is that alternatives to closure often will be inadequate or cause inconvenience or expense to the parties or the courts. (J.A., p. 15) The fact that alternatives may not be adequate in a particular case does not warrant elimination of this essential component in general. This Court has determined that there are alternative means available to protect the accused's right to a fair trial which must be considered before resorting to closure. These include intensive voir dire, additional peremptory challenges, jury admonitions, continuances, changes of venue, and partial closure of the proceeding. See, e.g., *Nebraska Press Association v. Stuart,* 427 U.S. 539 (1976). Admittedly some of these alternatives may cause inconvenience to participants of the trial but none are "beyond the realm of the manageable." *Richmond Newspapers,* 448 U.S. at 581. Indeed, inconvenience or expense to the participants appears to be a feeble rationale to justify secrecy in violation of constitutional rights. These motives pale in significance when one considers the

important structural and societal interests which are impaired by secret proceedings.

This Court repeatedly has held that proceedings closed to the public are to be tolerated only in "the rarest of circumstances." The California standard for closure under *Penal Code,* Section 868 actually encourages trial courts, acting in understandable concern for the defendant's fair-trial right, to close courtroom doors upon the slightest showing of possible prejudice. As such, it is constitutionally intolerable.

CONCLUSION

In a historic pronouncement, this Court in *Richmond Newspapers* declared a First Amendment right of access by the public to criminal trial proceedings. This watershed case and its progeny, *Globe Newspapers* and *Press-Enterprise,* in clear language set forth the values of an open trial system which warrant constitutional protection. A close analysis establishes, however, that the criminal justice system in America, and specifically in California, is not a trial system but predominantly a pretrial system. To guarantee the substantial benefits of openness, this Court must now declare this right attends pretrial proceedings, particularly preliminary hearings.

Respectfully submitted,

JAMES D. WARD,
SHARON J. WATERS,
THOMPSON AND COLEGATE
*Attorneys for petitioner**

---

*Petitioner and counsel for petitioner gratefully acknowledge the assistance of Gerald F. Uelmen, J.D., L.L.M., Professor of Law, Loyola Law School, Los Angeles, California, in preparation of this brief.